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SIMM ASSOCIATES, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RAMONA PATRICIA CARDON,

Plaintiff,

v.

SIMM ASSOCIATES, INC. a Delaware
corporation, and DEFENDANT DOES 1 through
10,

Defendant.

Case No.: C08-02130 RS

**SIMM ASSOCIATES, INC.'S OPPOSITION
TO PLAINTIFF'S MOTION FOR ORDER
TO REMAND**

Date: September 15, 2008
Time: 9:00 a.m.
Judge: Hon. James Ware
Courtroom: 8, 4th Floor
Place: 280 South First Street
San Jose, California

I. INTRODUCTION

The only issue before the Court is whether it has federal question subject matter jurisdiction. Plaintiff pled a state law claim and appears to have pled a federal claim, or at a minimum, a state law claim requiring application and construction of the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692 et. seq ("FDCPA"). Plaintiff's pleading definitely alleges entitlement to damages under the FDCPA. Thus removal was proper. However, now, Plaintiff seeks remand by characterizing her Complaint as only under state law. This characterization does not change the allegations in her pleading, and is irrelevant to the issue of whether this Court has subject matter jurisdiction.

This case is a debt collection matter involving Defendant Simm Associates' alleged failure to include the requisite notice set forth in Cal. Civ. Code §1812.700(a). Based on this purported

omission, Plaintiff RAMONA PATRICIA CARDON alleges a single claim under the Rosenthal FDCPA, Cal. Civ. Code §1788 et. seq., based on two grounds: (1) technical violation of Cal. Civ. Code §1812.702 for omission of the requisite Civ. Code §1812(a) notice; and (2) violation of the Federal Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692 et. seq., as incorporated by Civ. Code §1788.17. She seeks damages under both state and federal law.

Plaintiff in her motion attempts to evade basic tenets of original jurisdiction. In particular, she argues that her Rosenthal FDCPA claim does not present a federal question because Civ. Code §1788.17 is technically a state law claim, and merely incorporates the FDCPA. This argument flies in the face of adverse precedent and Plaintiff's own Complaint. Plaintiff has specifically pled entitlement to damages pursuant to federal law. Regardless of whether a California statute created the cause of action, in order to be entitled to those damages, Plaintiff must show a violation of federal law. As such, removal was proper and Plaintiff's motion to remand should be denied.

II. PROCEDURAL BACKGROUND

Plaintiff filed this action in the Superior Court of the State of California, Santa Clara County, on February 25, 2008. Defendant SIMM ASSOCIATES, INC. ("Simm Assoc.") removed the action in a timely manner to this Court on April 23, 2008, on the ground that this Court has original jurisdiction under 28 U.S.C. §1331. Plaintiff thereafter filed a motion to remand on June 2, 2008.

III. LEGAL ANALYSIS

A. **The Complaint Alleges Entitlement to Damages under Federal Law, Which Requires that Plaintiff Show a Violation of Federal Law.**

The Complaint contains one cause of action under the Rosenthal FDCPA, based on two grounds: (1) violation of Cal. Civ. Code §1812.702, for failure to include the notice set forth in §1812.700(a), and (2) violation of the FDCPA, 15 U.S.C. §§1692 (b)-(j), as incorporated by Cal. Civ. Code §1788.17. *See, Complaint*, attached to *Lewellen Decl.* as **Exhibit A**, ¶¶ 6, 7, 14, 18, 20, 23-24, Prayer for Relief at 5:15-21. Both grounds are based on the same set of facts; namely, that Defendant purportedly failed to include the notice required by Civ. Code §1812.700(a). *Id.* at ¶¶9-21. As to the FDCPA violations and remedy sought, Plaintiff alleges as follows:

As a result of Defendant's violations of the RFDCPA, Plaintiff is entitled to an award of statutory damages pursuant to 15 U.S.C. §1692k(a)(2)(A), as incorporated by Cal. Civil Code §1788.17.

Id. at ¶23.

As a result of Defendant's violations of the RFDCPA, Plaintiff is entitled to an award of her reasonable attorneys' fees and costs pursuant to Cal. Civil Code §1788.30(c) and statutory damages pursuant to 15 U.S.C. §1692k(a)(3), as incorporated by Cal. Civil Code §1788.17.

Id. at ¶24.

Plaintiff's prayer for relief demands (1) damages under the RFDCPA, Cal. Civil Code §1788 et seq., and §1812.700(a); and (2) statutory damages pursuant to the FDCPA, 15 U.S.C. §1692k(a)(2)(A), as incorporated by Cal. Civ. Code §1788.17. *Id.* at 5:10-22.

By the terms of Civ. Code §1788.17, in order for there to be a violation of the Rosenthal FDCPA and entitlement to FDCPA §1692k remedies, Plaintiff must show that Defendant failed to comply with the FDCPA §§1692b to 1692j. **Civ. Code §1788.17**; see, Hood v. Santa Barbara Band & Trust (Cal.App.2d 2006) 143 Cal.App. 4th 526, 544; see also, Winter v. I.C. Systems Inc. (S.D. Cal. 2008) 543 F.Supp.2d 1210, 1212. In this regard, Plaintiff appears to have pled a violation of federal law necessary to support a claim for damages under federal law. *Complaint*, ¶¶23-24. Further, in order to come under the ambit of the FDCPA, Plaintiff alleges that Simm Assoc. is a "debt collector" subject to the FDCPA, and the underlying obligation is a "debt" as defined by the FDCPA. *Id.* at ¶18; *Motion to Remand*, Docket No. 10, 3:12-16.

B. This Court has Original Jurisdiction Because the Complaint Raises a Substantial Question of Federal Law.

As a general matter, defendants may remove to the appropriate federal district court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a)-(b). The district courts have original jurisdiction under the federal question statute over cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; City of Chicago v. International College of Surgeons, (1997) 522 U.S. 156, 163, (U.S. Ill. 1997) 118 S.Ct. 523, 529.

A cause of action arises under federal law when the plaintiff's well-pleaded complaint raises issues of federal law." Metropolitan Life Ins. Co. v. Taylor, (1987) 481 U.S. 58, 63, 107 S.Ct. 1542, 1546. For instance, a federal question exists where the state law claim necessarily depends on resolution of federal law, such as where federal law is a necessary element of plaintiff's cause of action. Franchise Tax Bd. v. Construction Laborers Vacation Trust, (1983) 463 U.S. 1, 9-10, 27-28, 103 S.Ct. 2841, 2846-48; Bonvillian v. United Auto Credit (E.D. Cal.) 2007 WL 810097, *1-4. Moreover, even though state law creates plaintiff's cause of action, a case will still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under *state law requires resolution of a substantial question of federal law in dispute between the parties*. *Id.*; Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg. (2005) 545 U.S. 308, 312-314, (U.S. 2005) 125 S.Ct. 2363, 2366-2368; *see*, North American Phillips Corp. v. Emery Air Freight Corp. (C.A.N.Y., 1978) 579 F.2d 229, 233 ; *see, also*, Ivy Broadcasting Co. v. American Tel. & Tel. Co. 3(C.A.N.Y. 1968) 91 F.2d 486, 489.

Here, Plaintiff claims she is entitled to damages pursuant to 15 U.S.C.A. §1692k, as incorporated by Civ. Code §1788.17. However, she can only recover such damages by proving a violation of the FDCPA §§1692(b)-(j). **Civ. Code §1788.17**; *see*, Sanchez v. Client Services, Inc. (N.D. Cal. 2007) 520 F.Supp.2d 1149, 1159; *see also*, Hosseinzadeh v. M.R.S. Associates, Inc. (C.D.Cal. 2005) 387 F.Supp.2d 1104, 1118. Accordingly, the statutory requirements for the right of removal have been met, and this court should deny Plaintiff's motion. *See*, Pettit v. Consolidated Rail Corp. (N.D. Ind. 1991) 765 F.Supp.508, 509 (concurrent jurisdiction over the complaint is no bar to removal).

Plaintiff argues that she only alleges a violation of the Rosenthal FDCPA, not the FDCPA; and as a "state law claim", this Court does not have subject matter jurisdiction. Docket No. 10, 3:10-4:5.¹ This seems to be directly contradicted by the Complaint alleging damages under the FDCPA. Plaintiff cannot avoid removal by clever pleading and vague allegations. On the contrary, state law classifications are immaterial to this Court's jurisdictional inquiry. *See*, Feitelberg v. Merrill Lynch & Co. (N.D. Cal. 2002) 234 F.Supp.2d 1043, 1048.

¹ Plaintiff also argues that removal was improper because the FDCPA does not pre-empt the Rosenthal FDCPA. Defendant does not dispute this argument and ignores the argument since it is completely inapplicable to the issues at hand.

Under Plaintiff's explanation of her claims, she essentially argues that she is entitled to double recovery for a single violation of state law. However, as the double recovery is based on a claim of damages under federal law, a substantial question of federal law essentially exists. *See*, Docket No. 10, 3:12-4:1-5. Plaintiff cites Abels v. JBC Legal Group, Inc. (N.D. Cal. 2005) 229 F.R.D. 152, in support of her argument. Abels does not even remotely address the issue here and/or support Plaintiff's argument. *See*, Abels v. JBC Legal Group, Inc. (N.D. Cal. 2005) 229 F.R.D. 152. That case involved enumerated claims under both the FDCPA and RFDCPA. It did not address the issue of whether plaintiff is entitled to additional damages under the FDCPA, absent showing a violation of the FDCPA. *Id.* Regardless, Cal. Civ. Code §1788.17 does not entitle plaintiff to double recovery of the FDCPA damages, in addition to damages awarded for a RFDPCA violation under Cal. Civ. Code §1788.30. Napier v. Titan Management Services, LLC (N.D. Cal. 2008) 2008 WL 2949274, *3. As such, plaintiff must still show a violation of the FDCPA to be entitled to FDCPA damages, as incorporated by Cal. Civ. Code §1788.18. Thus, a substantial federal question is pled.

IV. **FEES AND COSTS SHOULD NOT BE AWARDED BECAUSE THERE WAS A REASONABLE BASIS FOR REMOVAL AND PLAINTIFF FAILED TO MEET AND CONFER WITH DEFENDANT PRIOR TO FILING HER MOTION.**

Even if the Court were to grant the motion to remand, it should deny plaintiff's sanction request under 28 U.S.C. §1447(c).

Pursuant to 28 U.S.C. § 1447(c), a district court may award "payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). An award of attorney's fees under §1447(c) is not mandatory. *Id.* Rather it is left to the sound discretion of the court, considering such circumstances as the nature of the removal, the nature of the remand and overall fairness to the parties. *See*, Moore v. Permanente Med. Group, Inc. (9th Cir. 1992) 981 F.2d 443, 446; Dacey v. Morgan Stanley Dean Witter & Co. 263 F.Supp.2d 706, 712. If the court finds that there was not a reasonable basis for removal, then the court has the discretion to award fees. Draper v. Erb (N.D. Cal.) 1994 WL 478821, *2; *see*, Coman v. International Playtex, Inc. (N.D. Cal 1989) 713 F.Supp. 1324, 1329 (fees denied where grounds for removal were colorable).

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1 First, here, Defendant removed the case immediately after Plaintiff filed her Complaint so there
 2 was no bad faith delay that prejudiced Plaintiff. *See, e.g., Tengler v. Spare* (N.D. Cal.) 1995 WL
 3 705142, *4-5.

4 Second, even if the Court remands to state court, Defendant's removal was reasonable in that
 5 Plaintiff's Complaint specifically plead entitlement to FDCPA damages, which require Plaintiff to
 6 show a violation of the FDCPA. **Cal. Civ. Code §1788.17.** *See, Zamdi-Dulabi v. Pacific Retirement*
 7 *Plans Inc.* (N.D. Cal. 1993) 828 F.Supp. 760, 764 (declining to award fees because defendants
 8 presented colorable argument for removal).

9 Third, it would be unfair to impose sanctions on Defendant. It is Defendant's understanding that
 10 Cal. Civ. Code §1788.17 only permits FDCPA damages if Plaintiff shows a violation of the FDCPA.
 11 Thus, removal was made in good faith in light of the law and Plaintiff's convoluted pleading.
 12 Moreover, Plaintiff did not contact defendant at any time to explain that no federal claim is alleged and
 13 request a stipulation to remand. *Lewellen Decl.*, ¶ 3. Rather, Plaintiff has ignored virtually all
 14 communications with Defendant with the sole exception to reject (but not counter) defendant's
 15 settlement offers. *Id.* at ¶4. As such, it would be unfair to Defendant to impose sanctions where
 16 Plaintiff never gave it the opportunity to clarify Plaintiff's allegations before the motion to remand was
 17 filed. *See, Moore v. Permanente Med. Group, Inc.* (9th Cir. 1992) 981 F.2d 443, 446.

18 Finally, if Plaintiff is really claiming only a violation of RFDCPA §1812.702, for failing to include
 19 the requisite §1812.700 notice, and agrees to withdraw the claim for double recovery of FDCPA
 20 damages under §1788.17, Defendant would agree that remand is proper. Plaintiff has not done so.

21 As such, under the circumstances, Plaintiff's request for fees and costs should be denied under
 22 §1447(c).

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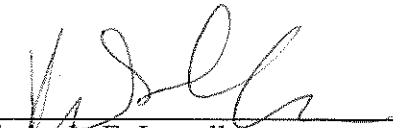
V. CONCLUSION

For the foregoing reasons, Defendant Simm Associates Inc. respectfully requests that the Court deny Plaintiff's Motion to Remand and request for attorney's fees and costs.

Dated: August 25, 2008

Ellis, Coleman, Poirier, LaVoie, & Steinheimer LLP

By



Kimberly E. Lewellen
Attorney for Defendant
SIMM ASSOCIATES, INC.

CERTIFICATE OF SERVICE

I, Sheri Trujillo, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 555 University Avenue, Suite 200 East, Sacramento, CA 95825.

On August 25, 2008, I served the following document(s) on the parties in the within action:

**SIMM ASSOCIATES, INC.'S OPPOSITION TO PLAINTIFF'S
MOTION FOR ORDER TO REMAND**

X	VIA ELECTRONIC SERVICE: The above-described document(s) will be delivered electronically through the Court's ECF/PACER electronic filing system, as stipulated by all parties to constitute personal service, to the following:
	BY MAIL: I am familiar with the business practice for collection and processing of mail. The above-described document(s) will be enclosed in a sealed envelope, with first class postage thereon fully prepaid, and deposited with the United States Postal Service at Sacramento, CA on this date, addressed as follows:
	BY HAND: The above-described document(s) will be placed in a sealed envelope which will be hand-delivered on this same date by _____, addressed as follows:
	VIA FACSIMILE: The above-described document(s) was transmitted via facsimile from the fax number shown on the attached facsimile report, at the time shown on the attached facsimile report, and the attached facsimile report reported no error in transmission and was properly issued from the transmitting facsimile machine, and a copy of same was mailed, on this same date to the following:
	VIA OVERNIGHT SERVICE: The above-described document(s) will be delivered by overnight service, to the following:

Fred W. Schwinn
Consumer Law Center, Inc.
12 South First Street
Suite 1014
San Jose, CA 95113-2404

Attorneys for
PLAINTIFF RAMONA PATRICA PLAINTIFF

I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on August 25, 2008.

By. 
SHERI TRUJILLO